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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-986

EDWIN MORROW CURRIE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No.

EDWIN MORROW CURRIE,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 23, 1979.

OPINION BELOW

The written opinion of the United States Court of Appeals for the Sixth Circuit is not yet reported and appears in the appendix.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit was entered on November 23, 1979, and this Petition for Certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19(1) (b) of the Supreme Court of the United States Revised Rules.

QUESTIONS PRESENTED

I. May an off duty police officer while on his own property and within the ambit of his personal pursuit be properly convicted under 18 U.S.C. §242 for violating the civil rights of another?

II. Was petitioner denied his right to a fair and impartial trial by jury as guaranteed by the Sixth Amendment when:

(a) One juror falsified his qualification form and concealed during the voir dire his lengthy arrest record as well as his two convictions for rape for which he received twenty year prison sentences; and
(b) Two jurors knowingly and intentionally concealed during the voir dire their criminal records?

STATUTORY PROVISION INVOLVED

The applicable statutory provision involved is 18 U.S.C. §242.

§242. Deprivation of rights under color of law.

Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any state,

territory, or district to the deprivation of any rights, privileges, or immunities secured or protected by the constitution or laws of the United States, or to different punishments, pains or penalties on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000.00 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .

STATEMENT OF THE CASE

A) **The Indictment.** Petitioner was charged in an indictment for violation of 18 U.S.C. § 242. It alleged that on or about April 23, 1977, petitioner, being an officer of the Memphis Police Department, violated the civil rights of Russell Charles Landers by striking, beating and assaulting him while acting under color of law.

B) **The Facts.**

1. Petitioner's conviction arose as a result of an incident occurring on April 22, 1977, at about 8:00 p.m. at the Red Oak Townhouses in Memphis, Tennessee.

Petitioner was 26 years of age and had been an officer of the Memphis Police Department since the fall of 1973. In 1976 he had requested a transfer from the Patrol Division to the Com-

munications Bureau where he was reassigned as a dispatcher. He was not assigned to regular enforcement activities or patrol functions.

On the day in question he was off duty and had arrived at his home at the Red Oak Townhouses between 7:30 p.m. and 8:00 p.m. Petitioner lived at 2160 Cherry Valley Lane and as part of his rental agreement was assigned two reserved parking places directly in front of his apartment.

At about 8:00 p.m., petitioner was upstairs in his bedroom watching television when he heard a vehicle pull up and park in front of his townhome. Petitioner thought that it was his ex-wife whom he was expecting.

Petitioner looked out the second story window of his apartment and saw the victim, Russell C. Landers.[1]

Petitioner, while still upstairs in his apartment, called down to the victim and asked him to move his vehicle because it was a private parking place. Landers responded to the effect that he didn't know how long he was going to be there but was going to park his car there anyway. Landers appeared slightly unsteady on his feet and disoriented.

Petitioner replied that he was a police officer and again asked Landers to move his vehicle. Landers made some menacing gestures and replied, "Why don't you come down and tell me I can't park here?"

Petitioner, dressed only in bluejeans, a t-shirt and without shoes, came downstairs and in the process picked up his service revolver, which was in a shoulder holster, and placed a short nightstick in his rear pocket.

[1] Racial overtones were not involved in the ensuing fight. Petitioner and the victim are both white.

Petitioner left his apartment and confronted Landers on the sidewalk outside his front door and in front of Landers' vehicle. Petitioner again advised that he was a police officer and asked that Landers move his vehicle from the private parking place.

At no time did petitioner threaten to arrest Landers or to take any action as a police officer if he did not move his vehicle; petitioner advised Landers that he was a police officer because he was wearing a sidearm and the way he was dressed. Landers admitted that petitioner was not talking to him as a police officer.

While standing there Landers made a move which petitioner interpreted to be a swing and in reaction to it, struck Landers once with the nightstick. No other blows were struck. Petitioner went back into his apartment, retrieved a pair of handcuffs, and after some difficulty in restraining Landers handcuffed him and placed him under arrest for public drunkenness and assault and battery. Patrolmen of the Memphis Police Department arrived on the scene and petitioner surrendered Landers to their custody.

Later in the evening, petitioner went to Central Police Headquarters and filled out a narrative reciting the incident that had occurred.

The government's proof included several witnesses to support Landers' version that he was not the aggressor.[2]

At the conclusion of the proof, petitioner moved for a directed verdict on the grounds that the facts did not warrant a conviction under 18 U.S.C. §242 because of the personal nature of the dispute. The motion was denied and petitioner was convicted.

[2] Whether petitioner was acting in self-defense is not germane to the questions presented.

C) **The Color of Law Issue.** It was the government's theory that petitioner was acting under color of law because of the Memphis Police Department regulation regarding off duty responsibility. The regulation states:

> Members are always subject to orders from a supervisory officer to calls for assistance from private persons. Being technically off duty does not relieve them from the responsibility of taking proper police action in any matter coming to their attention. When there is no urgent need for police action, they may request that the dispatcher turn the matter over to officers on duty, but they shall take such interim action as may be required prior to the arrival of the dispatched officers.

Except for that regulation, no other proof was offered by the government to show that the petitioner was acting under color of state law, custom or regulation.

D) **The Motion for New Trial.** After his conviction, counsel for petitioner learned for the first time that three jurors had failed to respond truthfully during the voir dire to questions concerning their criminal records.

One juror, Joe W. Brown, falsified his qualification questionnaire when he stated he had never been convicted of a state or federal crime punishable by imprisonment for more than one year. In fact he had been twice convicted of rape for which he received twenty year prison sentences. Also, he failed to reveal his previous arrests and convictions for gaming, assault and battery (the original charge having been rape), and numerous traffic offenses from 1956 through 1977.

Another juror, Marshall Johns, Jr., while not having been convicted of a felony, failed to make known that he had been arrested and convicted on a number of occasions since 1963.

The third juror, Joe R. Hales, failed to answer questions concerning his arrest for traffic offenses, his arrest for killing a domestic animal, and his arrest for rape (which was subsequently dismissed).

The District Court, after an evidentiary hearing, held that each juror's failure to answer the questions correctly was innocently done and that there had been no showing of actual bias or prejudice on their part. The Motion for New Trial was denied.

These questions were raised before the District Court and on appeal. They were specifically considered and decided by the United States Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING THE PETITION

A. Of the two questions presented, the first raises an important and reoccurring question under 18 U.S.C. §242 and its civil counter-part 42 U.S.C. §1983 because the government has gone beyond the verge of a permissible prosecution.

The record reflects that the petitioner was acting within "the ambit of his personal pursuit" - activity obviously beyond the purview of 18 U.S.C. §242. *Screws* v. *United States,* 325 U.S. 91 (1945); *Paul* v. *Davis,* 424 U.S. 693 (1975); *United States* v. *Classic,* 313 U.S. 299 (1941); *Stengel* v. *Belcher,* 429 U.S. 118 (1976); and *Civil Rights Cases,* 109 U.S. 3 (1883). It is important to note at the outset that the petitioner was not charged with an offense because he arrested the victim after the fight or instituted a criminal prosecution. Petitioner was charged under 18 U.S.C. §242 solely because he struck the victim while insisting that he get off his property. This was nothing more than an act within the ambit of his personal pursuits. *Screws* v. *United States, supra.* Unlike the assault in *Screws* v. *United States, supra,* petitioner did not act to take the victim into custody or to prevent his escape from arrest; he did not strike the victim for the purpose of extorting a confession. *Williams* v. *United States,* 341 U.S. 97 (1951). If the conviction in this case is permitted to stand, it would permit and encourage expansion into areas clearly prohibited by the previous decisions of this Court. *Screws* v. *United States, supra; Paul* v. *Davis, supra;* and *Civil Rights Cases, supra.*

Moreover, the opinion of the Court of Appeals when coupled with the facts of this case, conflicts with and is inconsistent with the relevant precedents of this Court. *United States* v. *Classic, supra; Screws* v. *United States, supra; Williams* v. *United States, supra; United States* v. *Williams,* 341 U.S. 70 (1951); *Griffin* v. *Maryland,* 378 U.S. 130 (1964). Recently, in *Stengel* v. *Belcher, supra,* this Court considered the factors that are relevant in warranting the exercise of federal jurisdiction under 42 U.S.C. §1983. A comparison of those present in *Stengel* v. *Belcher, supra,* ith the undisputed facts here clearly demonstrates that the Court of Appeals has gone beyond the limits defined by this Court. Since both 42 U.S.C. §1983 and 18 U.S.C. §242 draw upon the same body of law for interpretation and guidance, it is important that the pertinent facts demonstrate something more than conduct proscribed by local law if federal jurisdiction is to be properly exercised. *Paul* v. *Davis, supra,* (no right of recovery under 42 U.S.C. §1983 merely because the State is the tort feasor).

Furthermore, if proper and careful consideration is not given to the appropriate criteria, the vital distinction existing between our dual systems will be obliterated with the result that local issues will be tried under federal jurisdiction where the exercise of that jurisdiciton is questionable.

The conviction here seems to be predicted upon nothing more than the mere fact that the petitioner was employed as a police officer. This Court has stated repeatedly that a person does not act "under the color of law" simply because he might be employed in a governmental capacity. *United States* v. *Classic, supra; Screws* v. *United States, supra; Williams* v. *United States, supra;* and *Griffin* v. *Maryland, supra.*

In applying these principles, lower federal courts have consistently held that governmental employment alone does not make one act "under color of law". *Cole* v. *Smith,* 344 F.2d 721 (8th Cir. 1965); *Byrne* v. *Kysar,* 347 F.2d 734 (7th Cir. 1965); *Duzymski* v. *Nosal,* 324 F.2d 924 (7th Cir. 1963). One does not act under color of law simply because he is a police officer engaged in an assault as a matter of private conduct. *Nugent* v. *Sheppard,* 318 F.Supp. 314 (N.D. Ind. 1970); *Johnson* v. *Hackett,* 284 F.Supp. 933 (E.D. Pa. 1968); *Watkins* v. *Oakland Jockey Club,* 183 F.2d 440 (8th Cir. 1950). The proper focus must be upon the nature of the act performed and if the officer

had actually embarked upon the performance of his official duties, not whether he was on duty or off duty, in uniform or out of uniform. *Stengel* v. *Belcher,* 522 F.2d 438 (6th Cir. 1975); *Robinson* v. *Davis,* 447 F.2d 753 (4th Cir. 1971), cert. den., 405 U.S. 979 (1972); *United States, ex rel. Smith* v. *Heil,* 308 F.Supp. 1063 (E.D. Pa. 1970); *Johnson* v. *Hackett, supra.*

In affirming the conviction, the Court of Appeals has departed from the test announced in *United States* v. *Classic* concerning color of law where this Court held:

> Misuse of power, posessed by virtue of state law and made possible only because the wrong doer is clothed with the authority of state law, is action taken under color of state law. *Id.* at 326.

Furthermore, it appears that the Court of Appeals has now held that the constitution secures or protects a right to be free from assault by a private individual. The departmental regulation relied upon by the government to establish "color of law" has no more bearing on petitioner's conduct than the mere fact of his employment as a radio dispatcher for the Memphis Police Department. Nor, does it matter that petitioner identified himself as a police officer since the victim readily admitted that petitioner was not ordering him to do anything nor speaking to him as a police officer.

Certainly the victim did not have the right to expect nor may the government assert that he should be free from assaults by private individuals in defense of their property. Only those rights "secured or protected" by the Federal Constitution are safeguarded under 18 U.S.C. §242. *United States* v. *Williams, supra.* And, if one, acting "under color of law", deprives another of any of those rights, then prosecution under 18 U.S.C. §242 is permissible. However, if two persons conspired to assault another simply to inflict an injury, neither the conspiracy nor the substantive act would be punishable under the

federal law. Cf. *United States* v. *Harris,* 106 U.S. 629 (1883) [the Constitution affords no right from being lynched by private individuals who remove a prisoner from state custody]. The inquiry must be: does the Federal Constitution "secure or protect" the right to be free from assault and battery. Obviously, the answer is no and just as clearly the Federal Constitution does not "grant or secure" any right to be immune from an assault and battery. *United States* v. *Williams, supra.*

Unlike *Stengel* v. *Belcher, supra,* the facts here warrant review of this question by the Court.

B. The remaining question addresses the severe impropriety of three jurors concealing relevant, vital and material information during the voir dire. Their conduct vitiated the ability of petitioner to exercise his right to challenge, for cause or peremptorily in an intelligent fashion.

As a matter of law, the juror, Brown, was forbidden to serve on the jury. His convictions for rape automatically disqualified him from federal jury service.[3] Brown's reason for failing to respond to the trial court's inquiry is obvious: having lied on his qualification form, it was necessary to continue his lie to avoid detection and possible prosecution for having done so.

The district court's finding that his misstatement, as well as those of the other jurors, was the result of a "misunderstanding" is unsupported by the record when considered in the totality of the circumstances. Moreover, both the district court and the court of appeals departed from well established principles set out by this Court and other lower federal courts concerning the analysis and inquiry which must be made in similar circumstances.

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[3]28 U.S.C. § 1865 prohibits convicted felons from serving as jurors unless their rights have been restored by amnesty or pardon.

The right to exercise a peremptory challenge must be unimpaired if it is to have any meaning. "It must be exercised with full freedom or it fails of its full purpose." *Lewis* v. *United States,* 146 U.S. 370, 378 (1892). The denial or impairment of the statutory right of peremptory challenge violates petitioner's right to a fair and impartial jury. *Photostat Corp.* v. *Bell,* 338 F.2d 783, 786 (10th Cir. 1964).

While there are no rigid formulas for determining impartiality, *United States* v. *Wood,* 299 U.S. 123 (1936), there are certain safeguards to insure that an impartial trier of fact determines the issues. *Tumey* v. *Ohio,* 273 U.S. 510 (1927); *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972). In certain circumstances, even though a juror declares that he is impartial "the law cautiously incapacitates him from serving on the jury because it suspects prejudice; because in general, persons in a similar situation would feel prejudice." *Dennis* v. *United States,* 339 U.S. 162 (1949), dissenting opinion, Mr. Justice Black at 176; *Burr* v. *United States,* 25 Fed. Cas. 49, 50 No. 14692 G.

The circumstances here warrant a finding that at least Brown, if not all three, was prejudiced and biased as a matter of law. And, when prejudice is presumed as a matter of law, a trial court's finding of impartiality should be set aside. *Irvin* v. *Dowd,* 336 U.S. 717, 723-724 (1961); *Reynolds* v. *United States,* 98 U.S. 145, 156 (1878).

The district court and court of appeals failed to evaluate the record in accordance with the principles announced by this Court and as applied by other lower federal courts faced with the same problem.

Other courts have held that failure to disclose a material fact is prejudicial as a matter of law, *United States* v. *Chapman,* 158 F.2d 417 (10th Cir. 1946); that the failure, where not the fault of the party, interferes with the right to exercise a peremptory challenge, *Photostat Corp.* v. *Ball, supra;* that the failure to

disclose a material fact results in such fundamental unfairness as to constitute a denial of due process, *United States, ex rel. Fletcher* v. *Cavell,* 287 F.2d 792 (3rd Cir. 1961), cert. den. 366 U.S. 944 (1961); and that in any event, an appellate court should invoke its inherent supervisory powers where there is a substantial possibility that a juror is not capable of an objective determination of the facts. *Government of the Virgin Islands* v. *Bodle,* 427 F.2d 534 (3rd Cir. 1970).

Therefore, one must conclude that, at the very least, the following principles are applicable here.

If the three jurors are presumptively biased as a matter of law, then the petitioner is entitled to a new trial. *United States* v. *Daniels,* 357 F.2d 587, 591 (D.C. Cir. 1966). Prejudice need not be shown because if the facts had been disclosed by the three jurors it is clear that the district court would have been required to dismiss them for cause. Failure to dismiss them would certainly have been an abuse of discretion.

If the three jurors deliberately failed to respond (which the record demonstrates) a new trial is required because of the impairment of the statutory right of peremptory challenge.

Last, if the failure to disclose was innocent (which is what the district court found) an additional inquiry must be made to determine the materiality of the undisclosed information. Materiality is measured in two separate ways: first, would the trial court excuse the juror out of an abundance of caution if the fact was known, *Photostat Corp.* v. *Bell, supra; Dennis* v. *United States, supra;* and second, would disclosure of the fact have resulted in a peremptory challenge. *Photostat Corp.* v. *Ball, supra; Lewis* v. *United States, supra; United States* v. *Chapman, supra; Cf. Ward* v. *Village of Monroeville, supra.*

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER, 1979.

APPENDIX

APPENDIX A

No. 79-5044

United States Court of Appeals

for the Sixth Circuit

United States of America, Plaintiff-Appellee, v. Edwin Morrow Currie, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed November 23, 1979

Before: Lively and Merritt, Circuit Judge; and Peck, Senior Circuit Judge.

Per Curiam. The defendant appeals from a jury conviction for violation of the civil rights of another person contrary to the provisions of 18 U.S.C.§ 242. The appellant is a policeman who was off duty at the time he struck and injured one Russell C. Landers. On appeal it is contended that the defendant was not acting under color of state law when he struck Landers, but was engaged in a personal pursuit. There was conflicting evidence on this issue and the jury, under proper instructions, determined that the defendant was acting under color of state law and with the requisite intent.

The defendant also contends that the district court committed reversible error in denying his motion for a new trial, in improperly excusing a qualified juror without cause, in limiting his closing argument to fifty-four minutes and in excluding evidence that Landers, the prosecuting witness, had been convicted of a felony approximately 40 years prior to time of trial. Upon review of the record and consideration of the briefs and arguments of counsel the court concludes that the district court did not abuse its discretion in the rulings complained of and that the defendant-appellant received a fair trial.

The motion for a new trial was based on the defendant's contention that several jurors had not answered truthfully certain questions on the juror qualification forms and questions to them concerning prior criminal convictions. The verdict was not void. *Kohl* v. *Lehlback,* 160 U.S. 293, 302 (1895). Rather, the issue was one addressed to the discretion of the trial judge. The district court conducted an evidentiary hearing, taking testimony of the jurors involved, and found there was no showing of bias or prejudice to the defendant. We find no abuse of discretion in this holding. *Cf. United States* v. *Vargas,* _____ F.2d _____ (1st Cir. Sept. 24, 1979).

The contention that the sentence imposed by the district court was too severe does not present an issue for review.

The judgment of the district court is affirmed.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 609 F.2d 1193.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1979. The petition for a writ of certiorari was filed on December 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence from which the jury could conclude beyond a reasonable doubt that petitioner acted under color of law within the meaning of 18 U.S.C. 242.

2. Whether the court of appeals correctly upheld the district court's exercise of discretion in denying petitioner's motion for a new trial on grounds of juror prejudice.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of willfully depriving Russell Charles Landers of his civil rights while acting under color of law, in violation of 18 U.S.C. 242. Petitioner was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. A).

1. The evidence at trial established that on April 23, 1977, Russell Charles Landers was staying at the home of a friend, Ronald McGarrity, who lived two doors down from petitioner in a townhouse apartment complex in Memphis, Tennessee (A. 5, 8).[1] Each apartment was assigned two parking spaces and, in addition, there were visitors' parking spaces provided in the lot (A. 48-49, 147). When Landers returned to the complex between 7:30 and 8:00 p.m., both of McGarrity's parking spaces were occupied. Landers

[1] "A." refers to the joint appendix filed in the court of appeals.

parked his car in a space assigned to petitioner, intending to ask McGarrity where he should park for the evening (A. 11). As Landers left his car, petitioner called out from an upstairs window that the car was in a private parking space and would have to be moved (A. 11-12). Landers stated that he was going to ask McGarrity where he should park. When Landers started to walk in the direction of McGarrity's apartment, petitioner called out in an angry tone that he was a policeman, that he had company coming, and that Landers would have to move his car (A. 12).

Petitioner then came out of his apartment at a fast pace wearing blue jeans and a T-shirt, with a gun strapped in a shoulder holster under his left armpit and a billy club in his hand (A. 13-14, 41, 96). Petitioner approached Landers and stated again that he was a policeman (A. 14). Before Landers had time to explain his intentions about trying to move the car, petitioner hit him hard in the head with his billy club, and while Landers was reeling from the effects of the blow and bleeding profusely, petitioner pushed Landers around in the parking lot area and drew his gun (A. 14-15). An eyewitness, Yvonne Pleasants, hollered out that she was going to call the police, but petitioner stated he was a police officer and would handle the situation (A. 46, 99). Ms. Pleasants called the police anyway because "Mr. Landers hadn't done anything to deserve being hit on

the head and a gun being pulled on him * * *" (A. 47).[2]

Petitioner left Landers in the parking lot, went to his apartment and returned with a set of handcuffs, which he used to cuff Landers with his hands behind his back (A. 16, 167). Petitioner also called the police and, when a squad car arrived, he informed the responding officers that Landers was under arrest (A. 109-110, 168). The arresting officer testified that he took Landers into custody because petitioner, though off duty, had the power of arrest pursuant to a Memphis Police Department policy and had invoked that power in turning Landers over to him (A. 111).[3]

2. Following the jury's verdict, but before sentencing, petitioner moved for a new trial on the ground of juror prejudice. After an evidentiary hearing the district court denied the motion.

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[2] In addition to Ms. Pleasants (A. 42-46), two other eyewitnesses confirmed that petitioner's assault of Landers with the night stick was unprovoked and was preceded by petitioner's assertion of his authority as a police officer (A. 67-72, 92-99).

[3] Disciplinary Rule Number 120, entitled Off Duty Responsibility, provides (A. 58-59):

> Members are always subject to orders from a supervisory officer and to calls for assistance from private persons. Being technically off duty does not relieve them from the responsibility of taking proper police action in any matter coming to their attention. When there is no urgent need for police action, they may request the dispatcher to turn the matter over to officers on duty, but they shall take such interim action as may be required prior to the arrival of the dispatched officers.

The facts relating to petitioner's motion for a new trial are as follows. During voir dire, the court had asked all prospective jurors whether they or any close members of their families had "ever been involved in a criminal case either as a witness or a defendant" (A. 189). The jurors were also asked as a group whether any of them had ever had any negative experience with law enforcement, such as a traffic citation they considered unwarranted or other similar experience that caused them to feel resentment (A. 189a-189b). Although two jurors, Marshall Johns, Jr. and Joe R. Hales, had arrest records for minor offenses (A. 193), and another juror, Joe W. Brown, had pleaded guilty to two counts of rape in 1963 (A. 194-195, 200), none of the three responded to the court's voir dire questions on this subject (A. 189b). After examining all three jurors at the post-trial hearing, the court concluded that their lack of response during voir dire was the result of their having misunderstood the nature and purpose of the questions, and that they did not intentionally misrepresent their backgrounds or harbor any actual bias or prejudice against the petitioner (A. 234-236).

ARGUMENT

1. Petitioner contends (Pet. 8-11) that there was insufficient evidence in the record from which the jury could have concluded that he was acting under color of law when he committed the assault on Landers. The question whether a defendant charged with

violating 18 U.S.C. 242 has acted under color of law is one for resolution by the jury under proper instructions. *Williams* v. *United States*, 341 U.S. 97, 99 (1951). Petitioner does not here contest the conclusion of the court of appeals (Pet. App. A-1) that the jury was properly instructed, and this fact-bound sufficiency question does not warrant further review.

Contrary to petitioner's contention (Pet. 9), his conviction does not rest upon the mere fact that he was employed as a police officer. Rather, the record demonstrates that petitioner's entire course of conduct was undertaken in reliance on his authority as a state official. Petitioner, although off duty and out of uniform, was specifically authorized by police department regulations to make an arrest. When he discovered that Landers was parked in one of his parking spaces, he informed Landers that he was a police officer and requested that Landers move his car. He then pulled on his shoulder holster containing the Memphis Police Department's standard issue service weapon, picked up his regulation issue nightstick, placed it in his back pocket, and went outside to the parking lot. There he approached Landers, repeated that he was a police officer and requested that Landers move his car. Without provocation, petitioner then struck Landers across the forehead with his nightstick, handcuffed Landers with his police department issue handcuffs, and placed him under arrest, turning him over to the custody of an on-duty officer who responded to petitioner's call for assist-

ance. In short, petitioner purported to act in his official capacity when he ordered Landers to move his car; the ensuing assault was the direct result of petitioner's misuse of power that he possessed by virtue of his position as a police officer. See *United States* v. *Classic*, 313 U.S. 299, 326 (1941). Under these circumstances, the jury was entitled to find that petitioner was acting under color of law at the time he struck Landers.

That petitioner was off duty and at his residence at the time of the assault does not show, as petitioner argues (Pet. 8, 10), that he was acting only within the ambit of his personal pursuit. Interpreting the "color of law" requirement under 42 U.S.C. 1983 [4] the court in *Stengel* v. *Belcher*, 522 F.2d 438, 441 (6th Cir. 1975), cert. dismissed as improvidently granted, 429 U.S. 118 (1976), concluded that:

> [t]he fact that a police officer is on or off duty, or in or out of uniform is not controlling. "It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law." *Johnson* v. *Hackett*, 284 F.Supp. 933, 937 (E.D. Pa. 1968).

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[4] The phrase "color of law" in 42 U.S.C. 1983 is to be construed identically with the same phrase in 18 U.S.C. 242. See *Monroe* v. *Pape*, 365 U.S. 167, 185 (1961).

The court of appeals simply applied these settled principles to the facts of this case in ruling that the jury's verdict was supported by sufficient evidence.[5]

2. There is likewise no merit to petitioner's contention (Pet. 11-13) that his conviction resulted from juror prejudice. A party attacking the integrity of a jury's decision on grounds of juror prejudice bears the burden of persuasion that a juror was not impartial "not as a matter of speculation but as a demonstrable reality." *United States ex rel. Stickler* v. *Tehan*, 365 F.2d 199, 201 (6th Cir. 1966), cert. denied, 386 U.S. 992 (1967), quoting *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 462 (1956). Where the evidence that comes to light after trial shows neither a deliberate misrepresentation by the juror nor actual bias or prejudice, the decision whether to grant a new trial rests within the sound discretion of the district court. See *United States* v. *Mulligan*, 573 F.2d 775, 777-778 (2d Cir.), cert. denied, 439 U.S. 827 (1978); *Turner* v. *United States*, 416 F.2d 815, 817 (D.C. Cir. 1969); *Jackson* v. *United States*, 408 F.2d 306, 309 (9th Cir. 1969). Here, the district court found that the jurors' failure to respond to the voir dire questions was the result of innocent misunderstanding, and that the jurors were not prejudiced against petitioner. These findings were based on the court's assessment of the jurors' demeanor when they testified at the post-trial hearing. The court of appeals found no abuse of discretion by the district court here, and petitioner has shown no reason for this Court to deviate from its settled practice not to disturb a fact finding concurred in by two lower courts. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967); *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948).

The fact that juror Brown, as a convicted felon, would have been statutorily disqualified from serving on the jury (see 28 U.S.C. 1865(b)(5)) does not automatically require a new trial in the absence of a showing of bias or prejudice. See *United States* v.

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[5] There is no merit to petitioner's assertion (Pet. 8) that the decision below conflicts with several cases decided by this Court. In none of the cases on which petitioner relies did this Court hold that an official had not acted under color of state law. That certain conduct described in those cases was held to be within the scope of 18 U.S.C. 242 does not support petitioner's claim that his actions were not covered by the statute.

The other cases cited by petitioner (Pet. 9) are also inapposite. *Duzynski* v. *Nosal*, 324 F.2d 924 (7th Cir. 1963), and *Byrne* v. *Kysar*, 347 F.2d 734 (7th Cir. 1965), involved persons acting purely in their private capacities, and not, as here, a state official who purported to use his authority to deprive a person of his civil rights. In *Cole* v. *Smith*, 344 F.2d 721 (8th Cir. 1965), the court held that because internal prison discipline was a matter within the discretion of prison authorities, actions by state prison guards in allegedly assaulting prisoners were not shown to have violated the plaintiff's constitutional rights. In *Watkins* v. *Oaklawn Jockey Club*, 183 F.2d 440 (8th Cir. 1950) and *Johnson* v. *Hackett*, *supra*, police officers did not invoke their official authority, draw their guns, or use excessive force, as petitioner did here. Finally in *Nugent* v. *Sheppard*, 318 F.Supp. 314 (N.D. Ind. 1970), the court concluded that the police officer *was* acting under color of state law when he assaulted the plaintiff; the result in *Nugent* is thus not inconsistent with the decision of the court of appeals in this case.

Crockett, 514 F.2d 64, 69 (5th Cir. 1975); *United States* v. *Silverman*, 449 F.2d 1341, 1344 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1972); *Ford* v. *United States*, 201 F.2d 300 (5th Cir. 1953). Similarly, it is insufficient for petitioner to show that defense counsel might have exercised a peremptory challenge to strike any of these jurors. See, *e.g.*, *United States* v. *Mulligan*, *supra*, 573 F.2d at 777-778; *Williams* v. *United States*, 418 F.2d 372, 377 (10th Cir. 1969).

Nor is there any basis for petitioner's suggestion that the jurors here should have been determined to be prejudiced as a matter of law. The cases cited by petitioner in support of this theory (Pet. 12-13) involved situations in which the appellate court held that the facts known to the trial court at the time of trial showed actual prejudice, *United States* v. *Chapman*, 158 F.2d 417 (10th Cir. 1946) (juror had previously testified as an expert witness against the government in a condemnation suit growing out of the same condemnation project); *United States ex rel. Fletcher* v. *Cavell*, 287 F.2d 792 (3d Cir.), cert. denied, 366 U.S. 944 (1961) (foreman of the jury was the son-in-law of a witness who testified for the prosecution), or are otherwise inapposite.[6]

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[6] *Government of the Virgin Islands* v. *Bodle*, 427 F.2d 532 (3d Cir. 1970) and *Photostat Corp.* v. *Ball*, 338 F.2d 783 (10th Cir. 1964), also cited by petitioner, are distinguishable from the present case. In *Bodle*, at a trial for rape, a juror failed to disclose that his sister had been a victim of a forcible rape and murder some years earlier, while in *Photostat*, in a personal injuries case arising out of an automobile accident, several jurors had failed to disclose that they had been involved in similar accidents that resulted in damages claims for which they had been paid. Here, however, there was no evidence that any of the jurors or their relatives had been assaulted, or felt that they had been treated unfairly, by police officers. The mere fact that they had prior brushes with the law did not suggest that they were likely to be prejudiced against petitioner's cause merely because he was a policeman.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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